

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK LAMAR DANIEL<sup>1</sup>,

Defendant-Appellant.

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UNPUBLISHED

March 22, 2007

No. 266173

Wayne Circuit Court

LC No. 05-003691-01

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the shooting death of his cousin, Jeffrey Daniels (the victim). Defendant's first trial ended in a mistrial after the jury was unable to reach a verdict. At his second trial, a jury convicted defendant of voluntary manslaughter, MCL 750.321, and felony-firearm. He was sentenced to consecutive prison terms of 71 months to 15 years for the manslaughter conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm.

I. Double Jeopardy

Defendant asserts that at his first trial, the prosecutor "made unfair and untrue accusations of the subornation of perjury by insinuating to the jury that Defendant's counsel met with the witnesses and got them to change their testimony" and the "remarks were extensive during the examination of the prosecution's witness and the cross-examination of both Defendant's witnesses." Defendant argues that the prosecutor's improper conduct was intentional and caused the mistrial and, therefore, a second trial was barred by double jeopardy principles.

Double jeopardy bars a defendant from being retried when a mistrial was prompted by intentional prosecutorial conduct. *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). In this case, however, neither on appeal, nor in his motion below, did defendant cite to the record

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<sup>1</sup> There is a discrepancy in the record concerning the spelling of defendant's name, which appears to be "Daniels," rather than "Daniel."

or identify the prosecutor's questions or remarks that he believes were improper. A party may not leave it to this Court to search for the factual basis to sustain or reject his position, but must support factual statements with specific references to the record. MCR 7.212(C)(7); *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). In any event, it is undisputed that a mistrial was declared at defendant's first trial because the jury was unable to reach a verdict. A deadlocked jury constitutes manifest necessity for declaring a mistrial and retrial is permissible in this circumstance. *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002). Additionally, defendant has not submitted any evidence to support his assertion that the jury's failure to agree on a verdict was due to the prosecutor's allegedly improper conduct. For these reasons, we reject this claim of error.

## II. Motion to Quash

Defendant argues that the evidence at his preliminary examination was insufficient to bind him over on the charge of second-degree murder. This Court reviews de novo a circuit court's decision to grant or deny a motion to quash to determine if the district court abused its discretion in binding over a defendant for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). The district court must bind over a defendant if the evidence presented at the preliminary examination establishes that a felony has been committed and there is probable cause to believe that the defendant committed the crime. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support a bindover. *Id.* The prosecution is not required to prove each element of the crime beyond a reasonable doubt. If there is credible evidence to both support and negate the existence of an element of a crime, a factual question exists that should be left to the jury. *Id.*

The elements of second-degree murder are: (1) a death, (2) caused by the defendant's act, (3) with malice, and (4) without justification. Malice is the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). Malice may be inferred from the use of a deadly weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). Under the doctrine of transferred intent, it is sufficient for the prosecution to show that the defendant had the intent to kill, regardless of whether it was directed at a specific person. *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003).

The evidence at the preliminary examination established that the victim was shot in the back of the head and that defendant was in the back seat of the car behind the victim. Defendant was engaged in a discussion with a man in a neighboring car. Afterward, defendant stated that he was sorry and that it was an accident. The evidence supported an inference that defendant was responsible for shooting the victim and intended to shoot the man in the other car. The circuit court did not err in concluding that the district court did not abuse its discretion in binding defendant over on the charge of second-degree murder.

### III. Admission of Evidence

This Court reviews for an abuse of discretion a trial court's decision to admit evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The abuse of discretion standard is deferential and acknowledges that there is no single correct outcome; rather, there are multiple reasoned and principled outcomes. When a trial court chooses one of these principled outcomes, it does not abuse its discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant argues that the trial court erred when it allowed the victim's mother, Rita Martin, to testify as to what another witness, George Daniels (defendant's uncle), said defendant told him. The parties agree that defendant's statements to Daniels were admissible under MRE 801(d)(2)(A) as admissions by a party-opponent. The question is whether Daniels' statements to Martin constituted inadmissible hearsay. We are not persuaded by plaintiff's argument that Daniels' statements to Martin were admissible under MRE 801(d)(1)(B) as prior inconsistent statements, because the statements were made after a motive to fabricate arose. *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001).

However, even if the trial court erroneously admitted Martin's testimony, the error was harmless. A preserved nonconstitutional error is not a ground for reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999). An erroneous admission of hearsay evidence can be rendered harmless by corroboration by other competent testimony. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Because defendant's statements to Daniels were established by other competent testimony, it is not more probable than not that any error affected the outcome.

Defendant also argues that a police officer's testimony was inadmissible because it was irrelevant and prejudicial. Because defendant did not object to the testimony on the same ground that he now raises on appeal, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

Defendant's uncle, George Daniels, was the driver of the vehicle in which the victim was shot and he provided key testimony against defendant. Daniels spoke with police after the shooting and signed two written statements implicating defendant as the shooter. At some point Daniels became a reluctant witness against defendant, but offered consistent testimony pursuant to an investigative subpoena. Daniels' reluctance to testify was apparently owing to the fact that he was the victim of an assault, allegedly because of his cooperation with police. At trial, Sergeant Jenkins was allowed to testify that (1) he observed Daniels after he had been assaulted, which occurred after Daniels gave his original statements to police, but before the investigative subpoena hearing, (2) he became aware that Daniels knew the person who assaulted him, and (3) the assault was related to Daniels speaking to the police about the shooting.

Evidence bearing on the credibility of a witness is relevant. The test is whether the evidence will aid the factfinder in determining the probative value of other evidence offered to affect the probability of the existence of a consequential fact. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Daniels admitted that he did not want to testify and did so only because he was subpoenaed. Sergeant Jenkins' testimony was used to

show why Daniels was a reluctant witness and explain his apparent lack of candor at times. The testimony was relevant for this purpose.

We find no merit to defendant's argument that the testimony was unduly prejudicial because the jury was made to believe that defendant ordered the assault on Daniels. Although Sergeant Jenkins testified that he became aware that Daniels knew his assailant and that he was assaulted as a reprisal for speaking to the police, defendant was never identified as being responsible for the assault. Accordingly, defendant has not shown a plain error affecting his substantial rights.

#### IV. Ineffective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to (1) pursue an interlocutory appeal after the trial court denied defendant's motion for a directed verdict at trial, (2) seek an expert witness for defendant's defense of "firearm sound travel," (3) file a motion to dismiss based on spoliation of evidence where the police failed to secure the crime scene and failed to test a witness's clothes for gunshot residue. We conclude that defendant has waived review of this issue because he fails to make any argument to support his ineffective assistance of counsel claims. This Court need not make defendant's argument for him. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant presents no argument explaining why an interlocutory application for leave to appeal should have been granted or why the trial court's denial of his directed verdict motion was improper. Additionally, he does not explain what his "firearm sound travel" defense entailed or why an expert witness was necessary. Finally, he makes no assertion that any evidence admitted was "spoiled" or contaminated in the sense that it was in a different form than at the time of the shooting, and he does not explain why the alleged failure of the police to collect additional evidence would have supported a motion to dismiss. Accordingly, defendant has waived review of this issue.

#### V. Sentencing

Defendant argues that ten points were improperly scored for offense variable 6, MCL 777.36, because the facts necessary to score this variable were not found by the jury, thus violating his Sixth Amendment rights under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). He also argues that resentencing is required because the jury did not find the other offense variables proven beyond a reasonable doubt, contrary to *Blakely*.

The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Thus, this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant's argument regarding the scoring of OV 6, intent to kill or injure, is without merit. MCL 777.36(2)(a) states that "[t]he sentencing judge shall score this variable consistent

with a jury verdict unless the judge has information that was not presented to the jury.” The jury convicted defendant of voluntary manslaughter. Ten points is properly scored under OV 6 if “the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm.” MCL 777.36(1)(c). This language tracks the definition of voluntary manslaughter. See *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003).

Additionally, defendant’s reliance on *Blakely* is misplaced. Our Supreme Court has expressly held that the principles announced in *Blakely* do not apply to Michigan’s indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006). Therefore, defendant is not entitled to resentencing.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Joel P. Hoekstra